

(Mr. CAMPBELL), the Senator from New Hampshire (Mr. GREGG), the Senator from North Carolina (Mr. HELMS), the Senator from Arkansas (Mr. HUTCHINSON), the Senator from Pennsylvania (Mr. SANTORUM), the Senator from Alabama (Mr. SESSIONS), the Senator from Alabama (Mr. SHELBY), the Senator from New Hampshire (Mr. SMITH), the Senator from Pennsylvania (Mr. SPECTER), are necessarily absent.

The PRESIDING OFFICER (Mr. NELSON of Florida). Are there any other Senators in the chamber desiring to vote?

The result was announced—yeas 82, nays 0, as follows:

[Rollcall Vote No. 211 Ex.]

#### YEAS—82

Allen	Dorgan	Lugar
Baucus	Edwards	McCain
Bayh	Ensign	McConnell
Bennett	Enzi	Miller
Biden	Feingold	Murkowski
Bingaman	Feinstein	Nelson (FL)
Boxer	Fitzgerald	Nelson (NE)
Breaux	Frist	Nickles
Brownback	Graham	Reed
Burns	Gramm	Reid
Byrd	Grassley	Roberts
Cantwell	Hagel	Rockefeller
Carnahan	Hatch	Sarbanes
Carper	Hollings	Schumer
Chafee	Hutchinson	Smith (OR)
Cleland	Inhofe	Snowe
Clinton	Inouye	Stabenow
Cochran	Jeffords	Stevens
Collins	Johnson	Thomas
Conrad	Kennedy	Thompson
Corzine	Kerry	Thurmond
Craig	Kohl	Torricelli
Crapo	Kyl	Voinovich
Daschle	Landrieu	Warner
Dayton	Leahy	Wellstone
DeWine	Levin	Wyden
Dodd	Lincoln	
Domenici	Lott	

#### NOT VOTING—18

Akaka	Gregg	Murray
Allard	Harkin	Santorum
Bond	Helms	Sessions
Bunning	Hutchinson	Shelby
Campbell	Lieberman	Smith (NH)
Durbin	Mikulski	Specter

The nomination was confirmed.

Mr. REID. I move to reconsider the vote.

Mr. LEAHY. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. Under the previous order, the President will be notified of the Senate's action.

#### LEGISLATIVE SESSION

The PRESIDING OFFICER. Under the previous order, the Senate will now return to legislative session.

#### HOMELAND SECURITY ACT OF 2002

The PRESIDING OFFICER. Under the previous order, the Senate will resume consideration of H.R. 5005, which the clerk will report.

The legislative clerk read as follows:

A bill (H.R. 5005) to establish the Department of Homeland Security, and for other purposes.

Pending:

Lieberman amendment No. 4471, in the nature of a substitute.

The PRESIDING OFFICER. The Republican leader.

Mr. LOTT. Mr. President, I yield myself such time as I may consume under the leader's time.

The PRESIDING OFFICER. The leader has that right.

#### JUDICIAL NOMINATIONS

Mr. LOTT. Mr. President, I do not want to take an extended period of time because I know the managers of the legislation are here and ready to go forward with the very important consideration of and amendments to the Homeland Security Department, but I must comment on action last week of the Senate Judiciary Committee.

Once again, Mr. President, there has been a tremendous miscarriage of justice by the Judiciary Committee. By a vote of 10 to 9, a unanimous, partisan block of Democrats—10 Democrats—voted against the nomination of Priscilla Owen, who had been nominated by the President to a seat on the Fifth Circuit Court of Appeals.

The way this nomination was handled is a cause for great concern as well as the fact that, once again, the Senate will not have a chance to vote on a eminently qualified and experienced nominee to serve on the Fifth Circuit Court of Appeals. I am convinced that had her nomination been permitted to make it to the floor—as the Republican Majority in the past allowed numerous controversial Democrat nominees to get to the floor—Judge Owen would be approved by the full Senate and she would be confirmed.

We always hear the arguments of those who say that there have been actions in the past where nominees who were qualified were not given votes. However, during the time when I was majority leader I remember numerous cases where despite the belief of many Senators on our side that the nominees' views were far, far outside the mainstream, we still permitted their nominations to come to the floor. We did that because while we disagreed with their political and ideological views, it was still hard to argue that they were not professionally qualified.

Mr. President, I specifically remember the nominations of Marsha Berzon, Richard Paez and Rosemary Barkett. Certainly, these nominees, while they were qualified, were in my opinion not near as qualified in the legal profession as Priscilla Owen.

Berzon had had no judicial experience whatsoever. And a minority of the ABA evaluation committee gave Berzon and Paez only a "qualified" rating whereas the ABA committee unanimously—unanimously—gave Priscilla Owen its highest rating of "well qualified."

Beyond professional qualifications, numerous Senators on this side of the aisle also had severe concerns that Berzon, Paez, and Barkett were very far out of the mainstream in light of their records which raised questions for many Senators as to whether they should be confirmed.

Marsha Berzon had been a prominent ACLU and Labor Union lawyer who opposed parental consent laws for minors' to have abortions and had worked against the rights of individual workers in favor of the rights of unions. She was also a prominent and active member of the Brennan Center for Justice that cranked out initiatives it characterized as "stand[ing] up to right-wing attacks on the judiciary."

Richard Paez had written publicly of his belief that whenever judges feel legislatures have failed to act, "there's no choice but for the courts to resolve the question that perhaps ideally and preferably should be resolved through the legislative process." That is exactly the kind of judicial activism that Priscilla Owen's critics have falsely accused her of in order to give themselves an excuse for voting against her. Paez had also ruled as a district judge—prior to his confirmation to the appeals court—that States and cities could not outlaw was aggressive and intimidating panhandling by the homeless because it would infringe on a panhandler's free speech rights.

Rosemary Barkett, while a Florida Supreme Court Justice, had argued for overturning the death penalty of a man who had brutally murdered a youth in Jacksonville and then sent a tape to the victim's mother describing the horrible details of the killing. An opinion signed by Barkett opposed the death arguing that the killing was "a social awareness case . . . effectuated to focus attention on . . . racial discrimination."

Nevertheless, despite the misgivings and question marks from an ideology standpoint as to whether or not they should be confirmed, the Republican majority permitted all three of these nominations to come to the floor and be voted on by the full Senate and all three were confirmed.

Now, in contrast to these three far left nominees, let me speak to Priscilla Owen's qualifications.

First of all, I am not one who thinks it is particularly important whether the American Bar Association rates a nominee qualified or not. But, of course, the ABA's judgment has been described by a number of leading Democrats as the gold standard in terms of evaluating a nominee's qualifications to serve in the Federal judiciary. Senator LEAHY and senator SCHUMER described it that way in a March 16, 2001 letter to the President insisting that the ABA's role in the judicial confirmation process had to be maintained.

However, that did not prevent them from voting against Priscilla Owen after she received a "well qualified" rating from the American Bar Association—the highest possible rating they could give and they gave it to her unanimously. This is also the first instance, I believe, that we have had of a nominee rated "well qualified" by the American Bar Association being defeated in the Judiciary Committee and

the Senate. So, from the standpoint of the American Bar Association, this nominee certainly more than qualified.

Also, Mr. President, when you look at Judge Owen's record, it is clear that she has a long record of being outstanding not only academically and intellectually, but also from the standpoint of character, experience, and professionalism as well.

This is a nominee who has had a stellar legal career. She graduated with honors from Baylor Law School and its undergraduate program and made the highest score on the Texas bar exam the year she took it. She then had a highly regarded legal practice with a leading law firm in Texas for 17 years. She then gave up her lucrative private sector practice to serve with distinction for the past eight years on the Texas State Supreme Court.

She was elected, in a contested race, as I understand it, and then reelected unopposed with over 80 percent of the vote. She still enjoys overwhelming community support. She has been publicly endorsed and supported by Democrats and Republicans, including 15 former presidents of the Texas Bar Association. Every major newspaper in the state also supports her.

Mr. President, there is no question this nominee is qualified by experience, by education, and by the time that she spent in the Texas Supreme Court, where she has built up a very fine record of being a fair judge who has worked very hard in understanding the issues that have been before her and in casting her votes on the supreme court.

Yet, last week, I was shocked to hear her described by Senator DASCHLE as not qualified. These are exact quotes: "We will confirm qualified judges." "Don't send us unqualified people."

Whatever you may be able to say about might be wrong with this nominee—because maybe she is too conservative, or maybe on she did not meet some litmus test from the liberal outside interest groups or because she didn't meet the test of a particular Senator—in no way could you describe this nominee as not being qualified or as being unqualified.

I am very worried when we see this sort of pattern developing. There have probably been very few nominees in the past to serve on the Fifth Circuit Court of Appeals more qualified than this nominee by every category you might bring to bear.

Let me remind my colleagues on this point what the their gold standard ABA's actual standards are. Let me quote what the ABA itself says it looks at when it rates nominees.

The [ABA] Committee's evaluation criteria for federal judicial nominations is directed solely to professional qualifications: integrity, professional competence and judicial temperament . . .

Integrity is self-defining. The nominee's character and general reputation in the legal community are investigated, as are his or her industry and diligence . . .

Professional competence encompasses such qualities as intellectual capacity, judgment,

writing and analytical ability, knowledge of the law and breadth of professional experience . . .

In investigating judicial temperament, the Committee considers the nominee's compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias and commitment to equal justice under the law . . .

The ABA itself also notes that its standards are even higher for Appellate Court Nominees.

[T]he Committee believes that appellate court nominees should possess an especially high degree of scholarship and academic talent and an unusual degree of overall excellence.

Again, Mr. President, when the ABA applied these standards to Priscilla Owen they unanimously rated her "well qualified."

To merit a rating of "Well Qualified" the nominee must be at the top of the legal profession in his or her legal community, have outstanding legal ability, breadth of experience, the highest reputation for integrity and either have demonstrated, or exhibited the capacity for, judicial temperament.

So it is a shame to characterize this nominee as somehow being professionally unqualified and it is a shame that the full Senate was denied an opportunity to vote on her because of a partisan, straight party-line vote of 10-9 with all Democrats voting against her.

Again, in my opinion, it reflects very poorly on the Senate, and I fear it will make it even more difficult for us to complete our work when we see these types of allegations leveled against such a fine nominee. It also puts even further into question the utility and necessity of bothering to have the ABA evaluate judicial nominations when the Democrats on the Judiciary Committee are going to put ideology first and a nominee's professional qualifications and ABA rating a far second.

Mr. President, I could not let that partisan and unwarranted vote in the Judiciary Committee go unnoticed by the leader of the Republicans, and correct the public record regarding a nominee with such outstanding legal credentials as Judge Owen. She is clearly qualified.

I would note in closing that the Washington Post in an editorial published this past July 24 agreed with the President and Republicans when it said that:

Justice Owen is indisputably well qualified, having served on a state supreme court for seven years and, prior to her election, having had a well-regarded law practice.

I hope we will ultimately find a way for this nominee to be confirmed before all is said and done.

Mr. President, I yield to the Senator from Kentucky.

Mr. McCONNELL. Mr. President, I want to add to what the distinguished Republican leader has said. I have been in the Senate 18 years. This is the best witness I have ever heard, not just for a judicial nomination but for anything—an absolutely brilliant judge. She would have been confirmed had she been reported to the Senate, even without a positive recommendation.

I say to my friend, the leader, I worry about where we are, as well. I think we have crossed some kind of threshold here from which it is going to be very difficult to retreat from in the coming years.

I say to my friends on the other side of the aisle, we are not going to always be in the minority, and they may have a President again, as regretful as that might be to some of us, and the shoe could be on the other foot. Do we really want to establish this kind of standard, that we are prepared to vote down extraordinarily well qualified judges, who may be liberal or conservative, simply because we are of the other persuasion?

I think it is a low point in the recent history of the Senate. And I am not sure where we go from here. But I do not believe I will ever view these nominations quite the same way as I did in the past.

I can say this: I would like to have a lot of my votes back, going back over the last 8 years—Ginsburg, Breyer—scores of nominees for the circuit and district benches who I knew were far to the left of me, but I believed it was the President's prerogative. The Democrats won the election. It was the President's prerogative. And short of some kind of egregious failure to meet up to professional standards, it was not my place to impose my view on the nominee.

So I think it was a sad day in the history of the Senate. I agree with everything the Republican leader has had to say about this most unfortunate episode. I hope the President will not withdraw this nomination and will send it up again next year, and hopefully we will have a Senate with a little more of an open mind to this truly outstanding nominee.

Mr. LOTT. Mr. President, let me just conclude my remarks with this, a quote from Senator BIDEN, a member of the Judiciary Committee for a long time. Unfortunately, he was also recorded last week as voting against Judge Owen despite her excellent record and the ABA's highest rating. But when he was chairman of the Judiciary Committee, I am convinced he worked hard at trying to be fair in the way the nominees were considered under the previous President Bush.

But while on Judiciary Committee back in 1986 on the issue of judicial nominations he was quoted to this effect:

[Judicial confirmation] is not about pro-life or pro-choice, conservative or liberal. It is not about Democrat or Republican. It is about the intellectual and professional competence to serve as a member of the third co-equal branch of the Government.

I agree. Priscilla Owen met that criterion. She should have been confirmed.

I yield the floor.